Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM 1997

RICHARD BOLT MD
RICHARD BOLT MD PA *Petitioner,*

vs.

DAYTONA COMMUNITY HOSPITAL
ORMOND BEACH MEMORIAL HOSPITAL
RICHARD BOYE,MD
RALPH MARINO,MD
SHED ROBERSON,MD
ALVIN SMITH, MD *Respondents,*

On Petition For Writ Of Certiorari
To The UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Richard Bolt MD
98 Sea Marsh Road
Amelia Island, Fl. 32034
904 261-8202

49 pp

QUESTIONS PRESENTED FOR REVIEW

1. **Is it a denial of due process for a district judge to terminate a proceeding and force an involuntary settlement by coercing trial counsel to abruptly withdraw mid-trial, contrary to the written rules of the court and the various bar associations, while also denying any further attempts to proceed ?**

LIST OF PARTIES

PETITIONER

RICHARD A. BOLT, MD,
RICHARD A. BOLT, MD, P.A.

RESPONDENTS

RICHARD BOYE, MD
RALPH MARINO, MD
SHED ROBERSON, MD
ALVIN SMITH, MD

ORMOND BEACH MEMORIAL HOSPITAL

DAYTONA COMMUNITY HOSPITAL, a/k/a DAYTONA HUMANA, a/k/a DAYTONA COLUMBIA

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CITATIONS OF OPINIONS AND ORDER

The memoranda of the United States district court denying Dr. Bolt's request for a new trial pursuant to Rule 60(b) (4) and/or (6) are reprinted as Appendix A. The judgment and orders of the Eleventh Circuit Court denying a petition for rehearing are reprinted as Appendix B.

JURISDICTION

The Eleventh Circuit has inexplicably and silently sanctioned clear and gross departure from its own fundamentally important written rules governing the conduct and relationship of judges and lawyers that are designed to insure the right to be heard. If allowed to stand, it will encourage similarly expedient, but equally improper, conduct by other overburdened courts as an easy method of case disposition. It will also redefine, sub-silentio, our standards defining rational, fair and impartial adjudication and cast further doubt about the integrity of the bench . This great departure from the accepted and usual course of proceedings calls for an exercise of the supervisory power of the Supreme Court pursuant to its Rule 10 .

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be ... deprived of life,
> liberty or property, without due process of law...

STATEMENT OF THE CASE

Dr. Richard Bolt filed the underlying case in 1982 alleging that the simultaneous and coordinated denial of his surgical privileges at all three hospitals in the Daytona Beach, Fl. market was a violation of section 1 of the Sherman Act, 15 USC. In light most favoring Dr. Bolt, he faced a retaliatory boycott resulting from his appropriate peer review questions regarding fatally substandard care at the hands of influential physicians who also controlled the reappointment process. The market injury is the chilling effect this conduct has on unfettered peer review[1], which is encouraged and protected by the Health Care Quality Improvement Act of 1986[2] and articulated as pro-competitive by the Eleventh Circuit in Bryan v. Holmes Med Cntr., 33 F.3d, 1318 (1994).

Trial was initially held in 1984 before visiting Senior Judge Richard Kellam who entered a directed verdict for the defense after one day of trial.. Calling this "unfortunate", it was twice reversed by the Eleventh Circuit, including the *en banc* court; denied certiorari by this Court; inexplicably reached yet another panel of the

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[1] The defendants conduct, i.e., the fear of "being Bolted" has served as an effective gag clause for physicians that hinders peer review at the hospital level as well as in managed care agreements and other areas of the market.

[2] H.R.Rep. No.903, 99th Cong. 2d sess.2, reprinted in 1986 U.S.C.C.A.N. 6287,6384.

Eleventh Circuit[3] and finally set for re-trial in August of 1994.

The trial judge personally conducted unsuccessful mediation efforts in 1994. Thereafter, he began trial by announcing his displeasure that Dr. Bolt had rejected his efforts, complained that he was overworked, loathe to try the case, and promised that it was Dr. Bolt's last chance and it would be quickly finished with finality. He complained that Dr. Bolt's case was unfair to the system as it was "too old" (trial transcript pg.3,line 24; pg.6,line 6; pg.122,line 15) and that his attorneys were unprepared, dilatory, dishonest and untrustworthy. On the second day he imposed exorbitant fines on Dr. Bolt and his attorneys because of a perplexing claim that they should have prepared the **defendants** (*underlined for emphasis*) for more expedient testimony (trial transcript, pg.627,line 25). He made light of Dr. Bolt's witnesses , encouraging the jury to ignore them as boring (pg. 573-575; pg.707,line 10), while also admitting that he made evidentiary rulings adverse to Dr. Bolt out of angry retaliation toward his lawyers because they "had double banked him" (pg. 717,line 9).

Agreement that this unfortunate conduct was unduly prejudicial is not the issue. Importance lies in understanding that it was a prelude designed to facilitate more egregious judicial activism. Although the overbearing conduct was demoralizing to Dr. Bolt's

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[3] *see* Bolt v. Halifax Hospital Medical Center, 851 F.2d 128; 874 F.2d 755; 891 F.2d 810,(11th Cir.), cert. denied 495 U.S. 924, 110 S.Ct. 1960, 109 L. Ed. 2d 332 (1990); 980 F. 2d 1381.

attorneys, it was by design coupled with secretive judicial requests encouraging Dr. Bolt's attorneys to simply quit. Judge Merhige admits he repeatedly did so starting on the first day and continuing to the last day of trial:

> "While you are here ,now, I never give up, you know. Did you give any consideration to what I said yesterday....I said, do you think it would do any good to talk to your client ? I was a little stronger than that." (trial transcript, pg.945)

In response to this last entreaty, Dr. Bolt's attorneys capitulated. At the same bench conference their agreement to withdraw was then immediately announced to the defendants , but not to Dr. Bolt. That this judicial orchestration to withdraw was understood by all at bench, and considered extraordinary after twelve years of effort, is evinced by the incredulity of the defense in their response to the court:

> I have never been under the appreciation that the plaintiff's side of the case, that they would go away for less than a payment by us. (trial transcript, pg. 945)

At a discussion in chambers that immediately followed, Dr. Bolt's attorneys abruptly and formally moved to withdraw claiming it was futile to go forward

(pg.949).[4] The court announced this, on the record, to the opposition. The Local Rules of the Middle District of Florida, the Model Rules of the A.B.A., and the Florida Bar strongly and clearly prohibit such abrupt withdrawal and are well understood by lawyers and judges alike. As a group they chose to ignore their professional obligation to uphold the rules.

The Canons of the Federal Judiciary[5] mandate that Judges monitor and prevent such attorney conduct rather than encourage it. That this withdrawal was a crafty and conscious judicial attempt to terminate the proceeding with the finality it promised at the outset of trial (trial transcript, page 3) is demonstrated by the imaginative ruling that followed. The court realized that to allow the attorneys to simply leave would have forced a mistrial and a new trial. Attempting to insure finality, the court facilitated a substantively complete withdrawal by encouraging the lawyers to remain but not argue. It

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[4] This conference followed the inadvertent mention that Dr. Bolt's malpractice insurer had canceled his policy as it was funding a cost of defense in the case at bar. This was harmless error for at least two reasons. Inadvertent mention of insurance is rarely grounds for mistrial, *see* Rios v. bigler,67 F.3d 1543 (10th Cir.)1996; secondly the defendants waived any claim by refusing curative instruction, *see* Robinson v. Audi Nsu Auto 739 F.2d 1481(10thCir. 1984); *see also* United States v. Perez 30 F.3d 1407 (11th Cir.)1990

[5] GUIDES TO JUDICIARY POLICIES AND PROCEDURES, Code of Conduct for Judges and Judicial Employees

preserved the appearance of a correct proceeding by signaling Dr. Bolt that if he refused to accept a forced settlement, and attempted to continue, he was not going to be heard:

> I want to go home. I have got to go home. .....if we are not going to get it disposed of I will make the lawyers stay..... I won't insist on you making an argument because if you can't in good conscience, fine. But I will meet that when we come to it (trial transcript pg. 955, line 1-11)

Regardless of any fraternal claims, excuses, explanations, rationalizations or ingenious defenses made by other lawyers and/or judges, it can not be denied that to Dr. Bolt, and other lay people, this was a judicial demand that he either quit then or accept a charade of insincere and muted representation and lose later. The court's denial of Dr. Bolt's attempt to go forward in proper person further reveals its unhidden and sadly self serving desire to abort the proceeding :

> he is talking about acting pro se. I am not going to let him....(because) we will be here three weeks.(pg. 959,ln.16)

Dr. Bolt, having had his well-paid adversarial representatives purloined by the court, was forced to concede defeat and accept a forced and involuntary settlement. The trial judge entered an order dismissing the case with prejudice. Dr. Bolt immediately requested his attorneys seek post trial relief and they refused claiming

that no recourse was available. Unknowingly, he then filed a procedurally incorrect pro se appeal with the Eleventh Circuit which was denied for lack of jurisdiction on February 5, 1995.

At about this same time, Dr. Bolt was at last able to compel an explanation about events from his trial attorneys . In sworn deposition testimony they admitted their futility, and resultant withdrawal, arose because the trial judge indicated he was irrevocable prejudiced towards Dr. Bolt. This surprising disclosure prompted Dr. Bolt to request and review the entire trial transcript wherein Dr. Bolt became first fully aware of the above described judicial conduct. This awareness prompted an immediate pro- se request for a new trial filed with the trial court, under subsection 4 and 6 of Rule 60b, which was denied on 10/21/96 . An appeal was made in timely fashion to the Eleventh Circuit on April 1, 1997 and denied on October 27,1997. A request for rehearing was denied on May 12, 1998.

REASONS FOR GRANTING THE WRIT

PREFACE

The history of Rule 60 b(4) and (6) gives the courts great latitude in correcting any wrong, particularly for extraordinary cases that merit relief for any other reason. The time limit elapses only if at some point the petitioner elects not to move, Klapprott v. U.S., 335 U.S. 601, 69 S.Ct. 384 (1949) ;United States v.

Karahalis, 205 F. 2d, 331 . Dr. Bolt has been continuous in attempts for relief.

The extraordinary nature of this case is the absolute necessity to correct grossly improper techniques of judicial management that are a clear departure from usual and accepted adjudicatory procedure . It also is a long overdue opportunity for this Court to demonstrate, by example, that intellectually honest peer review in both the judicial and medical profession, although often distasteful, is a necessary obligation .

I. THE OPPORTUNITY TO DEMONSTRATE THAT THE COURTS ARE WILLING TO PROTECT MEDICAL PEER REVIEW AS MANDATED BY THE HEALTH CARE QUALTIY IMPROVEMENT ACT

The Health Care Quality Improvement Act of 1986 was meant to improve the quality of the healthcare product by encouraging intellectually honest peer review by protecting all peer reviewers from retribution. The courts have seemingly interpreted this as one sided, to only protect hospitals and their peer review committee members from retaliatory law suits. Hospitals largely abdicate their responsibility for peer review to the medical staff. These positions are then largely handed from partner to partner, friend to friend. There is little necessary correlation between patient skills and these appointments at the community hospital level. The presumption that these same physicians deal fairly with

competitors is not always correct. HCQIA anticipated the need to balance the unregulated power of the hospital, and these committees, but the courts have largely demonstrated unwillingness to do so. As a result the physicians who control the committee structure have increasingly recognized they are largely immune from scrutiny and that bad faith peer review can be used in anti-competitive fashion to punish those who express concern or criticism in the name of patient care towards them and/or the hospital.

Peer review committees rarely, or selectively, deal with substandard care and this case illustrates what now is factually confirmed by hard research. It has long been suspected that the best peer review of physicians is done by tort lawyers. A high profile malpractice case serves not only as a teaching tool but also an impetus to better performance. Recent government sponsored studies confirm that medical peer review is, as congress suspected, at best incomplete. These studies indicate that about 4% of hospitalized patients suffer an in hospital injury, one forth of which are clearly identified as a negligent medical injury. In real figures this study estimates that over 150,000 iatrogenic fatalities occur each year, more than half of which are due to negligence. Medical injury, in hospitals alone, accounts for more deaths than all other types of accidents combined and dwarfs the mortality rates associated with motor vehicle accidents (50,000 deaths per year). Not only is medical negligence more common than we think, the same government supported study also revealed that it was ignored or unrecognized by hospitals and physicians alike and consequently unrecognized by patients. This

extensive study , sponsored by the State of New York,to determine why there was a crises in malpractice premiums concluded that the real tort crises is in too *few* claims being filed[6]. Rarely however do physicians lose their hospital privileges because of incompetence and it is even rarer that the incompetent physician approaches the court for redress. On the contrary the physicians in most staff privilege cases seek intervention because the charges used to terminate their career are non patient care related. The defendants in this case[7] admit that Dr. Bolt was competent and complain that his deficiency was that he was overly critical of their own substandard performance. Moreover as expert witnesses testified at trial, the defendant physicians were not only guilty of negligent homicide in the care of these patients but they also "white washed" their own willful negligence.[8] This case is a precise representation of the congressional fear that peer review in medicine is lacking and now confirmed by hard research.

Peer review has perversely become more directed towards suppressing the role of physicians as quality-brokers for their patients. Demanding and

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[6] A MEASURE OF MALPRACTICE, Weiler,Hiatt,Newhouse,Johnson,Brennan & Leape, Harvard University Press 1993

[7] Dr. Bolt has faced a moving target of charges from the defense attorneys. The trial judge got their concession at mediation that Dr. Bolt's competence was not an issue and their clients have conceded on the record that such is the case.

[8] ibid

uncompromising concerns for patient care, although attractive attributes in partners or friends (and in your own personal physician), are often portrayed as abrasive disruption in competitors or enemies. Disruption is the most troublesome and frequently emerging part of the lexicon in the developing field of staff privilege disputes. A physician may see an incompetent and uncaring nurse as a danger to his patient while a hospital administrator, desperate to fill a nursing staff shortage or meet a bottom line projection, is annoyed that the physician would complain to him or to the nurse. Although no one can define the category of disruptive physician, the allegation alone is seemingly accepted as quickly as a knee jerk reflex by most courts , and with as much thought. It is a term used to pull the wool over the eyes of an indolent or overworked judiciary. The term "disruptive physician" needs be done away in exchange for the more established and objective terms used to describe patient care results. If behavior can be shown to injure patients it should be called negligence. If not, is it little more than demands for excellence ? If behavior can not be shown to impact clinical care, the hospital side of the medical services business should be required to clearly show an interference with business advantage. It should not be blindly accepted by the courts as a presumption to discharge a physician without significant proof of an irreparable working relationship. Patients are grateful that their physician will not tolerate the indifference of other health care workers. The patients reliance upon their physician to recommend one hospital over another assumes that the same diligence of concern will continue for the patient while in the hospital. The relationship of

physicians as a "hospital services broker" for the patient may be more important than requiring physicians to be blindly loyal employee of the hospital and need be looked at more closely than the courts have demonstrated heretofore.

The overwhelming perception shared by lawyers, health care workers and judges that courts blindly favor hospitals has allowed the HCQIA legislation to do precisely the opposite of what was intended by legislators. In the current climate of judicial apathy this perception, instead of encouraging debate, heightens the risk of indefensible retaliatory danger for physicians who express critical concerns about the quality of hospital services or of the practice patterns of the physicians (and their partners, friends and colleagues) who hold positions of power by virtue of committee appointment. Those in positions of appointed power serve as quasi-employees of the hospital and in gratitude frequently agree with the hospital that a concerned physician might one day become a dangerous finger pointer or perhaps even an adverse witness against them the next. Again the loyalty of the physician should be towards the patient first and he should not be punished for this priority. This symbiotic relationship between the hospital and its appointees rewards those on the inside at the expense of others, as it suppresses the critical dialogue that the legislature desires as a pro-competitive effort at quality. Peer review has been stifled because the courts seemingly hold that HCQIA is there to solely protect the increasingly dominant market force of the hospital. In theory HCQIA should also protect the independent physician who serves as a hospital services broker for the patient. In the role of

broker it is necessary to have the ability to bargain and demand quality for the client-patient without the fear of retaliatory boycott.

In order to strengthen peer review the courts need show protection for both the hospital services side of the patient care market, and its peer review agents, as well as independent physicians. The courts need overcome the perception that they interpret HCQIA only for the protection of the hospital by encouraging the high profile resolution of cases such as the one at hand, where there is clear evidence of wrong doing on the hospital, hospital peer review committee or any combination. Although HCQIA was designed for the protection of all, one is hard pressed to cite a case where the courts have found hospitals to have been acting in bad faith or even allowed a case to go forward without undue duress and difficulty on the part of the physician plaintiff. The instant case meets the unusual burden for relief as it is extraordinary and quite simply the only medical staff privilege case brought before the federal courts where a competent physician has been thrown out by less competent physicians and who are willing to admit that they do so precisely in order to avoid peer review criticism of themselves. They find Dr. Bolt's peer review actions to be overly harsh and unduly competitive and deserving of exclusion from the entire national market in spite of no claims of negligence or adverse action by any licensing board towards Dr. Bolt. The unequal harshness of their response highlights the great benefit to those in hospital committee power of a one sided HCQIA application. This case, now clearly the oldest struggle on record of a

physician seeking a fair hearing, is illustrative of the real resistance in the courts to the plight of patient advocates. Dr. Bolt's unsuccessful efforts at reaching a jury in over a decade and one half has also done precisely the opposite of opening up peer review. Defendant Smith, as President of the Florida Medical Association, has undoubtedly used this case to demonstrate the value of tyranny as a counter to intellectual honesty. As such it deserves consideration for unusual relief.

The unusual case at hand is valuable as it contains inarguable examples of bad faith on the part of the hospital defendants and illustrates the dangerous combination that can occur between self serving hospitals and physicians, again as anticipated by HCQIA but seemingly ignored or unrealized by the courts. The refusal of one of the hospitals to provide any hearing (Memorial Ormond Beach), and of the others a complete hearing, are sufficient alone to negate their presumed immunity. Horrifically, even criminal conduct on the part of the hospitals was ignored by the lower courts. Dr. Bolt faced a boycott after exposing not only the substandard care of influential physician, but also the efforts of the hospitals in suborning admitted perjury from its board members in attempts to suppress discovery of this fatal negligence. One board member circulated self initiated sworn statements, revalidated and re-circulated their authenticity in sworn deposition testimony, and only much later admitted it was fabrication, and knew it to be so earlier, when called to the stand at the trial in 1984. The perjured testimony from this board member had been solicited by a physician defendant (Smith) in order to deflect criticism towards himself and the hospital. This

vertical boycott between the hospital board and influential physicians designed to eliminate a horizontal competitor fits squarely into classic anti-trust law dating to the turn of the century, see Radiant Burners. This disclosure of admitted perjury was greeted with a yawn by the courts. Similarly, illicit drug use on the part of the defendants(Dr. Roberson) were suppressed by the trial court in 1994. They were fearful Dr.Bolt would expose their use of these drugs obtained from the hospital. Their fifth amendment responses obtained in discovery were not allowed because the judge angrily felt he had been "double banked." (infra)

The reluctance of the 1984 district court to allow expert testimony regarding the substandard care of the defendants and the validity of Dr. Bolt's peer review concerns, resulted in a decade long debate by the Eleventh Circuit. In spite of the careful decision to admit this, the 1994 trial judge reacted with anger towards Dr. Bolt and his attorneys claiming they had "double-banked" him. This is illustrative of the seemingly steadfast reluctance of the courts to monitor the quality aspects of the peer review process in medicine. Although the common sense importance of protecting intellectually honest peer review as a pro-competitive assurance of quality is now formally required by the HCQIA of 1986, it requires the cooperation of all three branches of government in order to be effective. Until the courts decide to assume their responsibility, the hospitals and hospital based peer reviewers can intimidate others into silence. The development of worrisome and objectionable formal "gag clauses" preventing physicians from candidly disclosing risk/ benefit and alternative therapies to

patients is a natural progression of the dominance of the big business side of the medical services market over the independent "patient-advocate" physician . This case is truly extraordinary in that it raises concerns that have never been considered, and probably not understood, by most courts. Relief would serve as a long overdue message that the value of quality peer review is clearly understood and protected by the judiciary and that balance between the divergent parts of the health care services market need be encouraged by a fair application of the law.

II. THE OPPORTUNITY TO DEFINE PROPER JUDICIAL ACTIVISM

In his year end report, Chief Justice Rehnquest has expressed formal concern that the "quality of Justice" might be threatened by the disproportion between the number of judicial vacancies and a resulting overburdened docket. This request for unusual relief will measure the validity of the Courts concern for these words and the quality of the product it supervises. The eager and profound departures from accepted standards by the trial judge are so grievous and apparent , and the silence of the Eleventh Circuit so thundering, that it should be spontaneously compelling for this Court to either explain or reject this new judeocracy.

Few districts are more overburdened than the Middle District of Florida. In explaining why federal judges are available only part time in Jacksonville and Orlando, Chief Judge Hon. Elizabeth Kovachevech,

admitted that her district is "in crises and judges are falling further behind."[9] Judicial management in the Middle District of Florida, and in most other districts will be increasingly relied upon to control an overburdened docket. To insure the quality of our judicial system, and validate the concern expressed by the Chief Justice, the higher courts need define boundaries and guidelines of judicial activism that conform to the written rules and ethics of the courts and substantively to a competent and fair adversarial process. Boundaries need be established by speaking out against grossly improper judicial management as illustrated by this case. A judge who would manipulate two well trained lawyers, members of the bar of this Court, into abandoning their client mid trial has disregard for our adversarial system. Although it is hard to determine how long, or frequent, such abuse of power has existed, it should be even harder to allow it to continue.

It is no coincidence that the trial judge whose conduct is at the center of this appeal has drawn attention from scholars for being overly active :

> Judge Merhige takes pride in describing his innovative and unusual methods to reach settlement. Even some of his most ardent supporters admit that some of his finest hours are not necessarily in the opinions he has written but rather his methods of judicial management. Not everyone feels that such an activist role

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[9] THE FLORIDA TIMES UNION, 11/4/97

> is appropriate for a judge. Judge Merhige and his supporters admit that some people feel he oversteps the bounds of his judgeship but 'that there's a difference between helping the parties settle a case and moving in and taking the case away from the lawyers.' The important distinction according to him is not to take the case away from the lawyers. "Judges can't settle cases," says Judge Merhige. "I'm not worried about someone saying, 'He forced us to settle.' Good lawyers can't be forced to do anything."[10]

The trial record shows that Judge Merhige violated his own guidelines by taking the case away from the lawyers by forcing and encouraging them to simply, and suddenly, quit. This occurred in flagrant disregard for the most basic aspects of adversarial representation required by the Local Rules of the Middle District of Florida, the Rules of the Eleventh Circuit and this Court, and the Canons of the Judiciary as well as the Model Rules of the ABA and the various other Bar Associations.

Of equal, or even greater, concern is Judge Merhige's near sinister attempts to avoid review. Legal scholars have anticipated and warned that overly active

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[10] Couric, Judge Robert R. Merhige,Jr., Nat'l. L.J., Aug.4, 1986, p.1 col.1, as cited by Riskin and Westbrook, Dispute Resolution and Lawyers. abridged edition, West Publishing Co., 1987, pg. 112

judges are vulnerable to this dangerous narcissism . The trial judge had articulated his desire to finish this case quickly and with finality at the beginning of trial(supra). He was aware that the Eleventh circuit, in reviewing the 1984 directed verdict, had indicated sufficient evidence existed to allow this to reach a jury. Nevertheless he attempted to force a verdict by the overbearing conduct and passive solicitations described above. His attempts to avoid review prompted his crafty attempts to create the appearance of a complete record by suggesting the lawyers stay but not argue(supra). The appearance of an unforced settlement created by his manipulations, coupled with delays created by the pro se litigants confusion arising from the abandonment have effectively served to shield his actions from review. This conduct is particularly pernicious:

> Judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging may be redefining sub silentio our standards of what constitutes rational, fair, and impartial

adjudication.[11]

The validity of this Court's concern for judicial quality, as articulated by the Chief Justice, is tested by this request for relief. The conduct of the trial judge can not be condoned and to do so questions the validity of your concern. This case presents a near obligatory opportunity to set parameters of propriety for judicial management. If ignored by higher courts it will be emulated by others. This "judeocracy" may help alleviate an overcrowded docket but will, in the long run, also do away with our need for the courts and we will exchange our adversarial system for unreasoned judicial arbitration. Ultimately the cost to the republic may be untold as the courts become of less value and disputes would be increasingly settled without the rule of law .

CONCLUSION

There is increasing concern and consensus that judicial management must carefully control discretion and preserve impartiality.[12] Judicial involvement in all phases of litigation should in no way

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[11] Resnick J., Managerial Judges, 96 Harv.L.Rev. 376,380 (1982)

[12] Wall, Rude & Schiller, JUDICIAL PARTICIPATION IN SETTLEMENT, 1984 Mo.J.Disp.Resol. 25,41

lead to a suggestion that the judge is anything less than an impartial umpire in a battle between adversaries.[13]

The conduct of the trial judge is a textbook case of improper judicial management, not as claimed by a disgruntled litigant, but as warned and predicted by the legal scholars quoted. He fit into their shoe verbatim. The unusual relief , if granted, would be an appropriately open and necessary means by which this Court could actively demonstrate its concern for judicial quality.

The concern for improving the quality of the health care product, by protecting the right of physicians to take part in constructive criticism, is also of overdue importance. Granting relief would be an equally appropriate method for this Court to acknowledge support of this concept in attempts at improving the quality of the medical services product.

The twelve year intensive efforts of the defendants to avoid trial and the persistence efforts of the plaintiff to reach a jury illustrates the intense competition between medical politics and medical substance . It is prayed the scale will be balanced.

Respectfully submitted
Richard Bolt MD
Amelia Island, Fl.

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[13] Riskin & Westbrook, DISPUTE RESOLUTION & LAWYERS, WEST Publishing Co., 1987

IN THE UNITED STATES DISTRICT COURT FORTHE MIDDLE DISTRICT OF FLORIDA
Orlando Division

FILED
96 OCT. 21 PM 4:11
CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

RICHARD A. BOLT,P.A.,et.al.
PLAINTIFFS

V.

CASE NO. 82-122-CIV-ORL-18

HALIFAX HOSPITAL MEDICAL CENTER,et.al.
DEFENDANTS

FINAL ORDER

This matter is before the Court on Plaintiff Richard A. Bolt, M.D.'s Amended Motion #1 in support of 60(b) 4 Relief Regarding "Due Process of Law" concerns. Upon due consideration, for the reasons stated in the memorandum this day filed and deeming it just and proper to do so, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion be and the same is DENIED.

Plaintiff is advised of his right to appeal to the United States Court of Appeals for the Eleventh Circuit. In order to exercise that right, Plaintiff must notify the clerk of this Court in writing within thirty(30) days of this date. Failure to do

so may result in Plaintiff losing his right of appeal.

Let the Clerk send a copy of this Order to all counsel of record and Plaintiff Richard Bolt, MD , 98 Sea Marsh Road, Amelia Island, Florida 32034.

s/ "Robert Merhige"

_____ UNITED STATES DISTRICT JUDGE

_date

IN THE UNITED STATES DISTRICT COURT FORTHE MIDDLE DISTRICT OF FLORIDA
Orlando Division

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96 OCT. 21 PM 4:12
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CASE NO. 82-122-CIV-ORL-18

HALIFAX HOSPITAL MEDICAL CENTER,et.al.
DEFENDANTS

ORDER

This matter is before the Court on a motion by Plaintiff Richard A. Bolt, MD for Reconsideration For Relief From Judgment Under 60(b) 6: and a motion to strike by defendant Memorial Hospital of Ormond Beach. Upon due consideration, for the reasons stated in the Memorandum this day filed and deeming it just and proper to do so, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion be and the same is also DENIED as moot.

Let the Clerk send a copy of this Order to all counsel of record and Plaintiff Richard Bolt, MD , 98 Sea Marsh Road, Amelia Island, Florida 32034.

s/ "Robert Merhige"

_____

_date UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FORTHE MIDDLE DISTRICT OF FLORIDA
Orlando Division

FILED
96 OCT. 21 PM 3:45
CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

RICHARD A. BOLT,P.A.,et.al.
PLAINTIFFS

V.

CASE NO. 82-122-CIV-ORL-18

HALIFAX HOSPITAL MEDICAL CENTER,et.al.
DEFENDANTS

MEMORANDUM

This matter is before the Court on a motion by Plaintiff Richard A. Bolt, MD ("BOLT") for Reconsideration For Relief From Judgment Under 60(b) 6: and a motion to strike by defendant Memorial Hospital of Ormond Beach. Defendants Alvin Smith, MD and Shederick Roberson, MD ("SMITH &ROBERSON) have also filed a Memorandum in Opposition to Bolt's Motion for Reconsideration. For the reasons which follow, the court will deny Bolt's Motion on the merits and deny Memorial Hospital's Motion as moot.

I.

On August 14, 1996, this Court entered an Order (Docket No. 112) which denied Bolt's

Motion for Relief From Judgment premised upon Rule 60(b) (6) alleging fraud comitted by his counsel. In the Memorandum which accompanied that Order (Docket No. 113), this Court unambiguously articulated the rationale behind its denial of Bolt's Rule 60 (b) (6) motion:

> There must be an end to litigation. Plaintiff Bolt having consented to judgment, and the judgment having been entered and he having appealed that judgment and lost, this case is at an end....(Bolt's) contention of fraud is untimely in any event. That portion of Plaintiff Bolt's motion wich seeks to vacate the judgment pursuant to 60(b) (6) as a result of alleged fraud will be denied.

Docket No. 113 at 3

Bolt subsequently filed a Motion for Reconsideration of the Court's ruling. In response Smith and Roberson filed their Memorandum in Opposition and Memorial Hospital moved under Fed. R. Civ. P. 12 (f) to Stike Bolt's Motion as violative of Local Rule 3.10 of the Local Rules of the United States District Court for the Middle district of Florida.

As Smith and Roberson correctly note in their Memorandum in Opposition, it is well-settled that motions for reconsideration are

"ordinarily granted only to correct clear errors of law or fact or to present newly discovered evidence which could not have been adduced during the pendency of the (original) motion." Kohl v. Murphy, 767 F. Supp. 895, 904 (N.D. Ill. 1991); see also Paper Recycling, Inc. v. Amoco Oil Co., 856 F. Supp. 671, 678 (N.D. Ga. 1993) ("(A) motion for reconsideration serves that limited purpose of correcting manifest errors of law or fact, or in certain circumstances, calling newly discovered evidence to the Court's attention.").

The Court finds that Bolt's Motion for Reconsideration does not present any newly discovered evidence. Instead, the Motion is merely a rehash of the arguments Bolt presented in his original Rule 60(b) Motion for Relief from judgment. Moreover, Bolt has failed to make any showing in his Motion for Reconsideration of a "manifest error of law or fact." See id. at 678. Accordingly, Bolt's Motion for Reconsideration will be denied. In light of the Court's denial of Bolt's Motion for Reconsideration, Memorial Hospital's Motion to Strike will be denied as moot.

An appropriate Order shall issue.

s/ "Robert Merhige"

_____
_date UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FORTHE MIDDLE DISTRICT OF FLORIDA

Orlando Division

FILED
96 OCT. 21 PM 3:45
CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
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RICHARD A. BOLT,P.A.,et.al.
PLAINTIFFS

V.

CASE NO. 82-122-CIV-ORL-18

HALIFAX HOSPITAL MEDICAL CENTER,et.al.
DEFENDANTS

MEMORANDUM

This matter is before the Court on Plaintiff Richard A. Bolt, M.D.'s Amended Motion #1 in support of 60(b) 4 Relief Regarding "Due Process of Law" concerns. Defendant Memorial Hospital of Ormond Beach, as well as Defendants Alvin Smith, MD and Shederick Roberson, MD ("SMITH &ROBERSON) have filed a Memorandum in Opposition and the matter is ripe for review. For the reasons that follow the Court will deny Bolt's motion.

I.

The issues presented in Bolt's amendedn motion were first before the Court on bolt's original Motion for Relif From Judgment premised upon Rule 60(b) 4. There, Bolt alleged that the trial court's actions violated his due process rights. In considering Bolt's motion the Court found that Bolt had only

offered a "general statement that the trial judge 'acted in a manner inconsistent with the due process of law.' " Docket No. 113 at 2-3. The Court found that Bolt made "no further attempt to elaborate on his conclusion concerning due process, nor does he state any facts in support of hos contention that fraud had been committed by his trial counsel. Indeed, he has simply attached to his motion excerpts of settlement negotiations." Id. at 3. Accordingly on August 14, 1996 this Court entered an Order granting Bolt a period of fifteen days to set forth facts , s distinguished from conclusory (sic) statements, which Bolt contends deprived him form due process of law. Docket No. 112. Subsequently Bolt filed his amended 60(b) 4 Motion.

II.

In his Amended Motion, Bolt points to six facts to support his argument that he was deprived of due process of law. Bolt claims that these facts reveal that he was denied both the right to be heard as well as the right to an impartial and competent judge. Upon due consideration, the Court finds that Bolt has failed to provide a sufficient factual basis to support his contention that he was denied an opportunity to be heard. An examination of the entire trial transcript reveals that the proceeding was not conducted in a manner that deprived

Bolt of notice, hearing, or any other fundamental constitutional right. On the contrary, Bolt was questioned by the trial judge and Bolt's counsel in the judge's chambers. After some discussion, Bolt voluntarily decided to dismiss his case with prejudice as to all defendants. In exchange, the Defendants agreed to waive any actions for costs against the Plaintiffs.

Similarly, the Court finds that Bolt has failed to present a sufficient factual basis to support his claim that the trial judge was partial or incompetent. The essence of Bolt's argument is that the trial judge improperly facilitated the request of Bolt's counsel to withdraw in mid-trial and then refused to allow Bolt to proceed pro se. However, a review for the entire trial transcript reveals that the Court specifically stated that it would not permit counsel for Bolt to withdraw during the trial. Tr. at 62, lines 3-8.

Finally, the Court notes that Bolt's Amended 60(b) (4) Motion, like many of Bolt's other post-trial motions, alleges improper conduct by Bolt's trial counsel. The Court emphasizes that Bolt's remedy, if any, exists not in this Court but rather through the independent malpractice action that Bolt is currently pursuing against his former attorneys.

This Court has afforded Bolt ample opportunity to present factual evidence that he

was denied his constitutional right to due process of law. After fourteen years of litigation, including nearly two years of appeal and post-trial motions, the Court finds that Bolt has not been deprived of his right to due process. Accordingly, Bolt's Amended 60(b)(4) Motion will be denied.

An appropriate Order shall issue.

s/ "Robert Merhige"

_____ UNITED STATES DISTRICT JUDGE

_date

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3645
Non-Argument Calendar

District Court No. 82-122-civ-orl-18

Richard A. Bolt,

Plaintiff-Appellant

Richard A. Bolt, MD P.A.,

versus

Halifax Hospital Medical Center; Daytona Community Hospital; Ormond Beach Memorial Hospital; Shed Roberson,MD; Alvin Smith, MD; Richard Boye, MD; Ralph Marino, MD

Defendants-Appellees

Appeal from the United States District Court for the Middle District of Florida

Before Tjoflat, Andersen and Black, Circuit Judges

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court

that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 27, 1997
For the Court: Thomas K. Kahn, Clerk
By: "s/ Matt Davidson"
deputy clerk

ISSUED AS MANDATE :
May 26 1998

[do not publish]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-3645
Non-Argument Calendar

D.C. Docket No. 82-122-Civ-Orl -18

Richard A. Bolt,

Plaintiff-Appellant

Richard A. Bolt MD P.A.

versus

Halifax Hospital Medical Center; Daytona community Hospital; Ormond Beach Memorial Hospital ; Shed Roberson MD; Alvin Smith,MD; Humana, Inc.; Richard Boye, MD; Ralph Marino, MD

Defendants-Appellees

Appeal from the United States District Court for the Middle District of Florida

---

(October 27, 1997)

Before Tjoflat, Anderson, and Black, Circuit Judges

PER CURIAM:

This is an appeal from an order of the district court denying appellants' motion for relief under Fed. R. Civ. P. 60 (b). We review the district court's action under the abuse of discretion standard of review. We find no such abuse in this case and therefore affirm.[1]

AFFIRMED.

---

[1] Appellants contend that a recent decision of the Supreme Court, Amchem Prods., Inc. v. Windsor, ___ U.S. ___, 117 S.Ct. 2231 (1997), requires us to set aside the district court's order and remand the case for further proceedings. We have considered the Amchem decision and conclude that it is inapposite.

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTTH CIRCUIT

No. 96-3645

FILED U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 12, 1998
THOMAS K. KAHN
CLERK

Richard A. Bolt,

Plaintiff-Appellant

Richard A. Bolt, MD P.A.

versus

Halifax Hospital Medical Center; Daytona Community Hospital; Ormond Beach Memorial Hospital; Shed Roberson MD; Alvin Smith MD; Richard Boye MD; Ralph Marino, MD,

Defendants-Appellees

On Appeal from the United States Court for the Middle District of Florida

ON PETITION for REHEARING and SUGGESTION of REHEARING EN BANC

Before: Tjoflat,Anderson and Black, Circuit Judges

PER CURIAM:

The Petition for REHEARING are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5) the Suggestions of Rehearing En Banc are DENIED

Supreme Court, U.S.
FILED
AUG 11 1998
OFFICE OF THE CLERK

No. 98-90

In The

Supreme Court of the United States

October Term, 1997

RICHARD BOLT, M.D., *et al.*,

Petitioners,

vs.

DAYTONA COMMUNITY HOSPITAL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ALVIN SMITH, M.D. AND SHEDRICK ROBERSON, M.D.

STEVEN H. PRESTON
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COUNSEL PRESS

QUESTION PRESENTED FOR REVIEW

Respondents are dissatisfied with Petitioners' framing of the question presented for review insofar as it assumes its own conclusions and contains erroneous allegations in its predicate. Respondents would respectfully submit that the proper question presented for review is as follows:

> Whether the United States Court of Appeals for the Eleventh Circuit abused its discretion in affirming the United States District Court for the Middle District of Florida's denial of Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b)(4) & (6).

PARTIES TO THE PROCEEDING

Petitioners are Richard A. Bolt, M.D., and Richard A. Bolt, M.D., P.A.

Respondents are Richard Boye, M.D., Ralph Marino, M.D., Shedrick Roberson, M.D., Alvin Smith, M.D., Ormond Beach Memorial Hospital, and Daytona Community Hospital n/k/a Atlantic Medical Center-Daytona.

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STATEMENT OF THE CASE

Respondents are dissatisfied with Petitioners' presentation of the Statement of the Case and must therefore reject same. Similar to their *pro se* Briefs to the Eleventh Circuit Court of Appeals in this matter, Petitioners' Statement of the Case is replete with conclusory allegations, misrepresentations of fact, unsubstantiated accusations, misstatements of the law, improper argument and matters which are extraneous, irrelevant, immaterial and *dehors* the record. Instead of accurately describing the salient facts of the case, Petitioners employ overblown rhetoric and misuse buzzwords like "judicial activism" to grossly distort the record and unfairly besmirch the reputation of the trial judges, the Honorable Richard B. Kellam and the Honorable Robert Merhige, Jr.

For example, Petitioners misrepresent the course of proceedings of this case after the first trial was held in February of 1984 before Judge Kellam. At the first trial, directed verdicts were entered on all three of Petitioners' antitrust conspiracy theories. The Eleventh Circuit Court of Appeals affirmed three of the directed verdicts and reversed three of the directed verdicts. *Bolt v. Halifax Hosp. Medical Ctr.*, 851 F.2d 1273, 1289 (11th Cir. 1988). Contrary to Petitioners' erroneous allegations, the Eleventh Circuit *never* called the directed verdicts "unfortunate." (Pet. 2.) In actuality, the Eleventh Circuit deemed the district court's handling of the case to be unfortunate only to the extent that Judge Kellam ruled on the motions for directed verdict prior to Dr. Bolt presenting his case for restraint on competition. *Id.* at 1289-1290.

Petitioners continue their gross distortion of the record by erroneously asserting that Judge Merhige, who presided at the second trial of this case in August of 1994, encouraged or demanded Petitioners' attorneys to quit during the trial and that

he facilitated their "abrupt withdrawal" in the midst of trial. (Pet. 4-6.) Nothing could be further from the truth. To the contrary, the record demonstrates that Judge Merhige specifically **refused** to allow Petitioners' counsel to withdraw during the trial, and he explained as follows:

> All right. You are down to just a matter of economics. There has been a motion made by counsel for the plaintiff to withdraw from the case. If I permit them to do it, we will be here for three weeks, because he is talking about acting pro se. I am **not going to let them do it**, though. (emphasis added.)

(E.R. 106, P. 62.)[1]

In a similar vein, Petitioners now claim that their reasoned decision to voluntarily dismiss their claims with prejudice were "forced and involuntary." (Pet. 6.) To the contrary, Petitioners undeniably understood the settlement agreement and voluntarily entered into it for the rational purpose of avoiding an enormous cost judgment, as the following discussion clearly demonstrates:

> THE COURT: You understand now that, by that I presume that you mean you are willing to dismiss this with prejudice in exchange for them not seeking any costs.
>
> MR. LITCHFORD: Including Halifax Hospital.
>
> THE COURT: What do you mean including?

---

1. Citations to the exhibits to the record on appeal in the Eleventh Circuit are in the form of "E.R. __, P. __", which refer to the docket number of the exhibit to the record on appeal and the page number of that particular document.

MR. LITCHFORD: They have got a pending motion for costs, and they have got common representation.

MR. CHRISTOPHER: They are backing Dr. Smith.

THE COURT: If it is a deal at all, it is a deal they don't come after you for costs whatsoever.

MR. LITCHFORD: All defendants.

THE COURT: Any of the parties in this suit. Now, is that your understanding doctor?

DR. BOLT: Uh hum.

THE COURT: Is that what you want? Not what you want, is that what you are going to do?

DR. BOLT: Uh hum.

THE COURT: Uh hum means yes, I gather.

DR. BOLT: Yes, sir.

THE COURT: All right.

(R. 106, P. 69-70.)[2]

Petitioners also erroneously accuse Judge Merhige of "signaling Dr. Bolt that if he refused to accept a forced settlement, and attempted to continue, he was not going to be heard." (Pet. 6.) In support of this outrageous accusation, Petitioners quote a small portion of the record, completely taken out of context,

---

2. Citations to the record on appeal in the Eleventh Circuit are in the form of "R. __, P. __", which refer to the docket number of the document in the record on appeal and the page number of that particular document.

and with obvious deletions signified by ". . ." *Id.* Significantly, Petitioners fail to mention that this portion of the record was made during a bench conference between Dr. Bolt, his attorneys and Judge Merhige, *outside* the presence of defense counsel. (E.R. 106, P. 57.)

Petitioners' mischaracterization of the record is obviously designed to create the inaccurate impression that Judge Merhige was prepared to have Petitioners' attorneys proceed with the trial, but not to make an argument. However, taken in context, it is clear that Judge Merhige's reference to "making an argument" referred to making a legal argument for a *withdrawal* and meant that he was going to spare Petitioners from the embarrassment of their attorneys making that argument in the presence of defense counsel. *Id.* Therefore, Petitioners' assertion that their attorneys were "purloined by the court" (Pet. 6) is another example of their overblown rhetoric and unsubstantiated accusations.

The course of proceedings below demonstrates that Petitioners have more than had their day in court. Dissatisfied with the results of their first trial in February of 1984, Petitioners began a protracted series of appeals. *See Bolt v. Halifax Hosp. Medical Ctr.*, 851 F.2d 1273 (11th Cir. 1988), *vacated*, 861 F.2d 1233 (11th Cir. 1988) (*en banc*), *remanded* to the original panel, 874 F.2d 755 (11th Cir. 1989) (*en banc*), 891 F.2d 810 (11th Cir. 1990), *cert. denied*, 110 S. Ct. 1960, 980 F.2d 1381 (11th Cir. 1993).

The case then went to a second trial on August 8, 1994 before the Honorable Robert Merhige, Jr., sitting by designation in the United States District Court for the Middle District of Florida, Case No. 82-122-CIV-ORL-18. On August 11, 1994, four days into that second trial, Petitioners, upon the advice of counsel, **voluntarily agreed** to the entry of an Order which

dismissed their claims **with prejudice** in exchange for Respondents' promise not to pursue any action for court costs or attorney's fees against Petitioners. (E.R. 95, 96 & 106.)

Notwithstanding the foregoing agreement, on September 9, 1994, Petitioners filed a Notice of Appeal in the Eleventh Circuit which asked for relief from said dismissal. (E.R. 98.) Upon Respondents' Motion to Dismiss, the Eleventh Circuit entered an Order on February 15, 1995 which dismissed Petitioners' appeal. (E.R. 100.) Subsequently, Petitioners filed Motions for Relief from Judgment under Fed. R. Civ. P. 60(b) on July 16, 1996 and on August 21, 1996. By Orders dated August 14, 1996 and October 21, 1996, respectively, Judge Merhige denied Petitioners' Rule 60(b) Motions. On November 18, 1996, Petitioners appealed Judge Merhige's denials of their Rule 60(b) Motions to the Eleventh Circuit, which affirmed Judge Merhige's rulings on October 27, 1997. Similarly, on May 12, 1998, the Eleventh Circuit denied Petitioners' Petition for Rehearing *En Banc*.

REASONS FOR DENYING THE WRIT

I.

THIS IS NOT AN APPROPRIATE CASE FOR EXERCISING THE COURT'S DISCRETIONARY JURISDICTION.

Denying the Petition for Writ of Certiorari would comport with this Court's standards of review under Rule 10, Rules of the Supreme Court of the United States. First, it is obvious that Rule 10(b) is inapplicable because it only pertains to state court decisions. It is also clear that Rule 10(c) is inapplicable because the Eleventh Circuit's decision did not decide "important question of federal law" at all, but rather merely affirmed the

district court's denial of Petitioners' Motions for Relief from Judgment. With further regard to Rule 10(c), it is incontrovertible that the Eleventh Circuit's decision does not conflict with any decision of this Court. Similarly, it is abundantly clear that the Eleventh Circuit's decision does not conflict with "the decision of another United States court of appeals on the same important matter." (Rule 10(a).)

Petitioners' attempt to cast this case as a "great departure from the accepted and usual course of proceedings", to invoke the exercise of this Court's supervisory power under Rule 10(a), is unavailing. Petitioners fail to recognize that the Eleventh Circuit did not "depart from the accepted and usual course of judicial proceedings" at all, nor has it "sanctioned such a departure by a lower court." To the contrary, the Eleventh Circuit simply ruled that the district court did not abuse its discretion in denying Petitioners' Motions for Relief from Judgment. The record in this case and the applicable law unequivocally demonstrate that the Eleventh Circuit had more than ample grounds for affirming the district court's rulings and that the course of proceedings in the district court did not even approach a "great departure from the accepted and usual course of proceedings."[3] *See* discussion *infra.* Thus, this Court should exercise its judicial discretion to deny the instant Petition.

---

3. Although there is scant authority which delineates the scope of this Court's supervisory authority under Rule 10(a), it appears that the typical exercise of such supervisory authority is in the context of "ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness." *Young v. U.S. Ex Rel Vuitton Et Fils S.A.*, 107 S. Ct. 2124, 2138 (1987).

II.

THE ELEVENTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTIONS FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(4).

Although Petitioners attempt to couch their Petition in terms of "denial of due process" and "judicial activism", they utterly fail to demonstrate that the final judgment of involuntary dismissal is void or that extraordinary circumstances compel setting it aside. Based on the judicial system's substantial interest in preserving the finality of judgments, setting aside a judgment under Rule 60(b)(4) is narrowly restricted to void judgments, "in the rare instance of a clear usurpation of power." *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972).[4]

The facts and circumstances of the August, 1994 trial before Judge Merhige demonstrate that the district court did **not** deny any fundamental due process to Petitioners. (E.R. 103-106.) Simply put, Petitioners agree to "throw in the towel" in exchange for Respondents' agreement not to seek any costs or attorney's fees from them. (E.R. 106, P. 67-71.) Despite Petitioners' unsubstantiated accusations and distortions of the record, they have **never** adduced any evidence whatsoever that Judge Merhige acted improperly, much less that he committed a clear

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4. *Accord Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1256 (1982) (to show that a judgment is void, the plaintiff must show not simple error, but that a fundamental due process was in fact denied to him); *Marshall v. Board of Education*, 575 F.2d 417, 422 (3rd Cir. 1978) (a judgment is not void merely because it is erroneous); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979); *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990).

usurpation of judicial power which actually denied due process. Furthermore, Petitioners have not set forth any actual facts, as opposed to conjecture and opinion, which show either that the district court abused its discretion in denying their Motions for Relief from Judgment or that the Eleventh Circuit abused its discretion in affirming the district court's rulings.[5]

Again, despite the absence of any factual basis whatsoever, Petitioners now claim that they were compelled to "accept a forced and involuntary settlement." (Pet. 6.) To the contrary, Dr. Bolt clearly made a reasoned decision, without any indicia of compulsion or coercion, to voluntarily dismiss his claims with prejudice. In chambers, Judge Merhige, as well as counsel for Petitioners, questioned Dr. Bolt about proceeding with the case. After some discussion, Dr. Bolt stated "I guess we are over. Thank you very much. I guess we are all through. We will throw in the towel." (R. 106, P. 69.)

A careful examination of the trial transcript for August 11, 1994 reveals that, far from coercing an unwanted settlement, Judge Merhige protected Petitioners from an enormous cost judgment (including possibly attorney's fees), and he sought to expedite the resolution of what had been more than twelve years of litigation. (E.R. 106.) This, of course, does not even come close to a denial of due process. The fact that Petitioners actually were heard at trial, prior to the entry of the final judgment, confirms the voluntariness of the settlement and

---

5. Petitioners include a laborious and irrelevant diatribe about peer review and alleged conduct on the part of the hospitals and physicians whom Petitioners have enmeshed in this litigation for sixteen years. (Pet. 8-16.) Respondents vehemently object to Petitioners' outrageous and unsubstantiated accusations that Dr. Smith solicited perjury (Pet. 14-15.) and that the hospitals committed "even criminal conduct." (Pet. 14.) These accusations are wholly improper insofar as the record in this case is completely devoid of any finding or admission of perjury or criminal conduct.

militates very strongly against a finding that the judgment is void.

Petitioners' assertion that Judge Merhige was "irrevocably prejudiced towards Dr. Bolt" is unavailing. (Pet. 7.) Once again, Petitioners present no actual facts in support of their accusation; they merely provide a hodgepodge of baseless conjecture and isolated comments taken out of context. Petitioners utterly fail to demonstrate that Judge Merhige was so biased or so prejudiced that the trial was fundamentally unfair. *See, e.g., Margoles*, 660 F.2d at 295.[6] As in *Margoles*, the instant Petition is really a manifestation of Petitioners' inability to let go of this litigation, rather than the product of any substantive merit. Hence, as in *Margoles*, the Eleventh Circuit properly affirmed the district court's denial of relief under Rule 60(b)(4).

III.

THE ELEVENTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTIONS FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(6).

It is clear that the Eleventh Circuit did not abuse its discretion in affirming the district court's denial of Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b)(6). The reason is that Petitioners utterly fail to satisfy this Court's long standing requirement for relief under Rule 60(b)(6); that is, adducing evidence of "extraordinary circumstances." *See, e.g., Ackermann v. United States*, 71 S.

6. The Seventh Circuit's reasoning in *Margoles* is fully applicable herein: "[E]ven personal and direct involvement in proceedings creating the grounds for animosity toward a party . . . is not a sufficient showing of deprivation of constitutionally guaranteed fairness." 660 F.2d at 297.

Ct. 209 (1950). *See also Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984); *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111 (11th Cir. 1993). Uncontroverted authority holds that a "party seeking relief [under Rule 60(b)(6)] has the burden of showing that absent such relief, an 'extreme' and 'unexpected' hardship will result." (citations omitted) *Griffin*, 722 F.2d at 680.

Simply put, Petitioners cannot demonstrate that the judgment of voluntary dismissal with prejudice at the second trial has caused them to sustain any extreme and unexpected hardship. The fact that the voluntary dismissal relieved Petitioners from the burden of paying Respondents' costs is not a hardship at all. In reality, Petitioners are merely experiencing a form of "buyer's remorse."[7] However, this Court has long held that relief under Rule 60(b)(6) is not available where, as here, a party has made a deliberate litigation decision which later inures to his detriment; this even applies where hindsight may indicate that he made a mistake. *Ackermann*, 71 S. Ct. at 211-212. Because Petitioners' decision to accept the voluntary dismissal of their case in exchange for Respondents' agreement not to pursue a cost judgment against them does not constitute the extraordinary circumstance of an extreme and unexpected hardship, the Eleventh Circuit properly affirmed the district court's denial of Petitioners' Motions for Relief from Judgment.[8]

---

7. The authorities are legion that buyer's remorse does not allow one to invoke relief under Rule 60(b)(6). *See, e.g., Sheng v. Starkey Laboratories, Inc.*, 117 F.3d 1081 (8th Cir. 1997); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572 (10th Cir. 1996); *Andrulonis v. United States*, 26 F.3d 1224 (2nd Cir. 1994).

8. Petitioners' attempt to invoke the authority of *Klapprott v. United States*, 69 S. Ct. 384 (1949), is purely specious. The petitioner in *Klapprott* had a default judgment entered against him in denaturalization proceedings while he was severely ill, penniless and after four years of incarceration in another state. 69 S. Ct. at 385-389. In complete contrast to the indigent

(Cont'd)

CONCLUSION

Based on the foregoing facts, circumstances and authorities, the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(Cont'd)
petitioner in *Klapprott*, Dr. Bolt was never incarcerated, never deprived of the opportunity to participate in court proceedings (two trials were held during twelve years of litigation), and experienced trial counsel represented Dr. Bolt.

No. 98-90

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

RICHARD BOLT, M.D. and RICHARD BOLT, M.D., P.A.,

Petitioners,

vs.

DAYTONA COMMUNITY HOSPITAL; ORMOND BEACH MEMORIAL HOSPITAL; RICHARD BOYE, M.D.; RALPH MARINO, M.D.; SHED ROBERSON, M.D.; and ALVIN SMITH, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DAYTONA COMMUNITY HOSPITAL, RICHARD BOYE, M.D., AND RALPH MARINO, M.D.

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit abused its discretion in affirming the denial by the United States District Court for the Middle District of Florida of Petitioner's Motions for Relief from Judgment under Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure.

PARENT COMPANY AND NONWHOLLY OWNED SUBSIDIARIES

Respondent, Daytona Community Hospital, pursuant to Rule 29(6), provides the following list demonstrating the corporate hierarchy of the former Daytona Community Hospital:

> Columbia/HCA Healthcare Corporation is the parent company of the following entities: Western Plains Regional Hospital, Inc.; Galen Health Care, Inc.; Galen Holdings, Inc.; Daytona Medical Center, Inc.; d/b/a Atlantic Medical Center — Daytona f/k/a Columbia Medical Center — Daytona f/d/b/a Daytona Community Hospital, which has no nonwholly owned subsidiaries.

PARTIES TO THE PROCEEDING

Petitioner is: Richard A. Bolt, M.D., and his professional association, Richard A. Bolt, M.D., P.A.

Respondents are: Daytona Community Hospital n/k/a Atlantic Medical Center — Daytona; Ormond Beach Memorial Hospital; Richard Boye, M.D.; Ralph Marino, M.D.; Shed Roberson, M.D.; and Alvin Smith, M.D.,

STATEMENT ON PARTIES AND ABBREVIATIONS

Respondents, Daytona Community Hospital, Richard Boye, M.D. and Ralph Marino, M.D. are referred to herein as "Respondents." Richard A. Bolt, M.D. and Richard A. Bolt, M.D., P.A. are referred to herein as the "Petitioner" or simply, "Bolt." Citations to the documents referenced as Exhibits to the Record on Appeal, have been abbreviated as "(ER — volume # - page #)."

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Respondents, Daytona Community Hospital, Richard Boye, M.D. and Ralph Marino, M.D., hereby adopt the arguments and authorities contained in any Briefs in Opposition filed by Respondents, Alvin E. Smith, M.D., Shedrick W. Roberson, M.D. and Ormond Beach Memorial Hospital, as additional support for the arguments contained herein.

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STATEMENT OF THE CASE

The Respondents, Daytona Community Hospital, Richard Boye, M.D., and Ralph Marino, M.D., submit the following Statement of the Case, as they find the Statement submitted by the Petitioner inadequate and wish to supply important information that has been distorted or omitted altogether.

This action was filed on March 23, 1982 by Petitioner, Richard A. Bolt, M.D. [hereinafter "Bolt"], a general and vascular surgeon, on behalf of himself and his professional association, alleging that three hospitals located in Daytona Beach, Florida and five physicians practicing there, violated federal anti-trust laws by conspiring to deny his application for permanent staff privileges at those hospitals. The case was originally tried in 1984 and numerous appeals followed.[1]

On August 11, 1994, the case was tried for the second time, and after four days of trial, Bolt, then Plaintiff, with the advice of counsel, voluntarily agreed to the entering of an order dismissing the case with prejudice as to all Defendants. (ER-96-1). In exchange, Defendants agreed to waive any and all actions for costs against Bolt. (ER-96-1). On September 9, 1994, Bolt served a Notice of Appeal to the Eleventh Circuit Court of Appeals, asking for relief from dismissal and asserting that their voluntary dismissal was the result of a lack of prudent advice and undue influence.[2] (ER-98-1).

---

1. *See Richard A. Bolt, M.D., et al. v. Halifax Hospital Medical Center, et al., slip op.*, Case No. 82-122-ORL-CIV-18 (M.D. Fla. Mar. 21, 1984), *aff'd in part, rev'd in part, and remanded*, 891 F.2d 810 (11th Cir.), *cert. denied*, 110 S. Ct. 1960 (1990); *see also Richard A. Bolt, M.D., et al. v. Halifax Hospital Medical Center, et al.*, 851 F.2d 1273 (11th Cir. 1988), *vacated*, 861 F.2d 1233 (11th Cir. 1988) (*en banc*), 891 F.2d 810 (11th Cir. 1990), *cert. denied*, 110 S. Ct. 1960, 980 F.2d 1381 (11th Cir. 1993).

2. In the United States Court of Appeals for the Eleventh Circuit, *Richard A. Bolt, M.D., et al., Appellants/Plaintiffs v. Halifax Hospital Medical Center, et al., Appellees/Defendants*, bearing Case No. 94-3149.

On September 28, 1994, Defendants filed a Motion to Dismiss Bolt's appeal. The Eleventh Circuit then dismissed Bolt's appeal on February 15, 1995. (ER-100-1). On July 16, 1996, Bolt filed a Motion for Relief from Judgment under Rule 60(b)4 and 60(b)6, Fed. R. Civ. P. in the District Court. (ER-107-1). The Honorable Robert R. Merhige, Jr. denied this Motion in an Order filed August 19, 1996. (R1-112-1). Bolt filed a Motion for Reconsideration which was also denied by the lower court in a Final Order filed October 21, 1996. (R1-114-1, R1-124-1). Bolt filed his Notice of Appeal in the Eleventh Circuit on November 18, 1996. (R1-125-1). The Eleventh Circuit affirmed Judge Mehrige's denials of Petitioner's Rule 60(b) motions on October 27, 1997, and denied a Petition for Rehearing and Suggestion for Rehearing En Banc of the same on May 12, 1998.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF UNDER RULE 60(b)4.

Petitioner Bolt's appeal is based on denial of a Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure, which is not to be used to disturb the finality of judgments, except on narrow grounds and only where there is a showing of exceptional circumstances. *See Smith v. Widman Trucking & Excavating*, 627 F.2d 792 (11th Cir. 1980). The rule is not intended to allow litigants to avoid the consequences of a decision to settle or dismiss their claim in retrospect. *See id.* at 795.

Further, the mandatory time limitations set out in Rule 60(b) are founded on a judicial interest in speedy disposition and

finality, and may not be extended for the reasons stated by the Petitioner. As this Court stated in *Ackermann v. United States*, there must be an end to litigation someday, and free, calculated, deliberate choices are not to be undone. 71 S. Ct. 209, 211-212 (1950). Bolt's decision was his own.

Bolt has failed to demonstrate that the trial court's judgment is void. Petitioner is not entitled to relief under Rule 60(b)(4), which authorizes a court to relieve a party from Final Judgment only where such judgment is void. The concept of void judgments usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979). As the judicial system has a substantial interest in preserving the finality of judgments, the concept of setting aside a judgment under Rule 60(b)(4) is very narrowly restricted. *Id.* at 225.

A void judgment has been defined as "one which, from its inception, was a complete nullity and without legal effect." *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972). The court in that case stated that only in the rare instance of a "clear usurpation of power" will a judgment be rendered void. Petitioner's misinterpretation of the record results in unfounded charges of usurpation of power by Judge Merhige. Additionally, in *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990), the court stated a judgment is void only if the court lacked jurisdiction or if there were circumstances in which the court's action constituted a violation of due process. *See also Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1256 (1982) (plaintiff must show more than simple error — they must show that a fundamental due process was in fact denied); *Marshall v. Board of Ed., Bergenfield, N.J.*, 575 F.2d 417, 422 (3d Cir. 1978) (judgment is not void merely because it may be erroneous).

The facts and circumstances of the 1994 trial did not constitute a fundamental denial of due process. In fact, Bolt agreed to "throw in the towel" in exchange for the Respondents' agreement not to seek any costs or attorneys fees. (ER-106-69). Bolt has presented no evidence whatsoever that the court acted improperly or that the conduct of the Honorable Robert R. Merhige, Jr. amounted to usurpation of judicial power, thereby denying fundamental due process. Judge Merhige explained to Bolt that his attorneys had moved to withdraw and that the case was down to a matter of economics. (ER-106-63). An examination of the record at trial confirms that the court sought to protect Bolt from the consequences of enormous costs, judgments and possible attorneys' fees. Bolt demonstrated on the record that he understood. (ER-106-71).

In contemplating Bolt's motion under Rule 60(b)4, the trial court found that he offered only a "general statement to the effect that the trial judge had acted in a manner inconsistent with the due process of law." (R1-113-3). The court stated that Bolt made

> no further attempt to elaborate on his conclusion concerning due process, nor does he state any facts in support of his contention that fraud had been committed by trial counsel.

(R1-113-3). Subsequently, Bolt filed an amended Rule 60(b)(4) motion after the trial court granted him the opportunity to set forth additional facts. (R1-112-1). This supplemental motion was considered and the court stated in a Memorandum Opinion that

> an examination of the entire trial transcript reveals that the proceeding was not conducted in a manner

> that deprived Bolt of notice, hearing, or any other fundamental constitutional right.

(R1-123-2).

Contrary to Bolt's assertions in his Petition, he was not denied an opportunity to be heard, he had an impartial trial judge and was not denied effective assistance of counsel, even though he was dissatisfied with them. A litigant is not denied due process by either the appearance of partiality or by circumstances which might lead one to speculate as to a judge's impartiality. Rather, a "litigant is denied due process if he is *in fact* treated unfairly." *See Margoles*, *supra* at 296 (emphasis in original). Bolt cannot demonstrate such unfair treatment.

Also, Bolt has provided no facts which indicate he was denied an opportunity to be heard in connection to his decision to voluntarily dismiss his claims on August 11, 1994. An examination of record reveals that Bolt, in fact, made a reasoned decision to voluntarily dismiss his claim with prejudice and was not denied any fundamental constitutional rights.[3] In *Boch*, *supra*, the court explained a strong judicial reluctance to disturb final judgments as follows:

---

3. The relevant statements in the transcript are as follows:

> DR. BOLT: I guess we are over. Thank you very much. I guess we are all through. We will throw in the towel.
>
> THE COURT: You understand now that, by that I presume you mean you are willing to dismiss this with prejudice in exchange for them not seeking any costs.
>
> MR. LITCHFORD: Including Halifax Hospital.
>
> THE COURT: What do you mean including?

(Cont'd)

One of the basic tenants of our system of jurisprudence is that of finality of judgments. The

(Cont'd)

MR. LITCHFORD: They have got a pending motion for costs, and they have got common representation.

MR. CHRISTOPHER: They are backing Dr. Smith.

THE COURT: If it is a deal at all, it is a deal they don't come after you for costs whatsoever.

MR. LITCHFORD: All defendants.

THE COURT: Any of the parties to this suit. Now, is that your understanding, Doctor?

DR. BOLT: Uh hum.

THE COURT: Is that what you want? Not what you want, is that what you are going to do?

DR. BOLT: Uh hum.

THE COURT: Uh hum means yes, I gather.

DR. BOLT: Yes, sir.

THE COURT: All right.

(ER-106-69, line 20 through ER-106-70, line 16)

THE COURT: The lawyers agree to it?

MR. LITCHFORD: Yes, sir.

MR. CHRISTOPHER: Yes, sir.

DR. BOLT: They won't talk to the press about it.

(Cont'd)

> principle of finality is essential to insure consistency and certainty in the law. This solitary principle is founded upon the generally recognized public policy that there must be some end to litigation.

Id. at 660. The *Boch* court stated that it was particularly reluctant to reopen the judgment

> entered by consent because in making such agreements the parties have voluntarily and consciously decided not to contest the legal and factual elements of the case.

Id. Bolt voluntarily agreed to the entry of an Order which dismissed his claim with prejudice in exchange for the Petitioner's promise not to pursue any actions for court costs or attorneys' fees against him.

Finally, Bolt's allegations concerning the conduct and withdrawal of his own attorneys is wholly irrelevant and

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(Cont'd)

> THE COURT: Oh, no.
>
> MR. LITCHFORD: It is a settlement of the parties.

(ER-106-71, lines 3-8).

> THE COURT: I explained that I had asked if you all would pay anything and what your response was.
>
> I am authorized to enter an order, it is on the record, authorized to enter an order that — well, I did not tell them the phraseology, but it will be like this. Upon motion of the parties and deeming it proper so to do, it is adjudged and ordered that this action be and the same is hereby dismissed with prejudice; each party to pay its own costs.

(ER-106-71, lines 15-23).

immaterial to the relief sought in this appeal. Bolt sought to remedy those complaints in an independent legal malpractice action.[4] Bolt's present accusations in no way constitute competent evidence of a denial of due process and are plainly discernable as attempts to resurrect and protract this litigation.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF UNDER RULE 60(b)6.

With respect to relief requested by Petitioner, Bolt, under Rule 60(b)(6), the Eleventh Circuit Court of Appeals has articulated a standard of relief under this clause as an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. *See Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984); *See also Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993). The Eleventh Circuit has also emphasized that "final judgment should not be lightly reopened" due to the "desirability for order and predictability in the judicial process . . . " 722 F.2d at 680. Bolt has utterly failed to carry out his burden showing that Rule 60(b)(6) relief is necessary to avert the exceptional circumstances of the extreme and unexpected hardship.

Bolt's arguments for relief under this rule merely indicate his subsequent dissatisfaction with the ramifications of his voluntarily dismissal. It is well-settled that hindsight does not constitute grounds for relief. *See Ackermann, supra*, at 211 (party cannot be relieved of choice because hindsight seems to indicate it was probably wrong); *Andrulonis v. United States*, 26 F.3d

4. In the Circuit Court of the Ninth Judicial Circuit, In and For Orange County, Florida, *Dr. Richard A. Bolt and Richard A. Bolt, M.D., P.A., Plaintiff, v. Litchford & Christopher, P.A., Hal K. Litchford, Individually and Donald E. Christopher, Individually, Defendants*, Case No. CI-95-6593.

1224, 1235 (2d Cir. 1994) (Rule 60(b) does not enable a court to indulge a party's discontent as to the result of its bargain); *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994) (a party who makes a choice to settle cannot be relieved of that choice, "merely because of her assessment of the consequences was incorrect"); *Lloyd v. Carnation Co.*, 101 F.R.D. 346, 348 (M.D.N.C. 1984) (Rule 60(b) is not meant to relieve any litigant of strategic or tactical decisions which later prove to be improvident); *In re: Master Key Anti-trust Litigation*, 76 F.R.D. 460 (D. Conn. 1977) (party cannot seek Rule 60(b) relief where his assessment of the consequences of the settlement was incorrect).

As a general rule, no matter how unjust one party may later come to regard a settlement, if it is free from fraud, it cannot be attacked. Likewise, if subsequent developments do not meet the expectations of the settling party, the settlement is not open to collateral attack based upon advice of counsel and undue influence. *Oaks v. City of Fairhope, Ala.*, 515 F. Supp. 1004 (S.D. Ala. 1981); *see also Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988) (when a litigant voluntarily accepts an offer of settlement, the integrity of the settlement cannot be attacked on the basis of inadequate advice by the litigant's attorney).

It is undisputed that the Respondents agreed to waive all fees and costs in exchange for Bolt's voluntary dismissal. This was communicated to Bolt by his counsel, and he agreed to voluntarily dismiss the case after a conference with his attorneys and the Honorable Robert R. Merhige, Jr. (ER-106-1). Bolt obviously continues to have second thoughts about the voluntary dismissal. This, in and of itself, does not establish unfairness or justify the setting aside of an otherwise valid and voluntary dismissal, especially considering Bolt did not properly preserve this issue for appeal pursuant to the Federal Rules of Civil Procedure and was thus denied appellate review.

Bolt's Rule 60 motion to the lower court stated that the case involved not only a "blunder of counsel," but also conduct of the Honorable Robert R. Merhige, Jr., which Bolt states in the motion, was "concerted" indicating a conspiracy between his attorneys and the Judge, which is patently absurd. (ER-107-9). Bolt made confusing arguments and claims of newly discovered evidence and fraud of parties and his own counsel, whose alleged ineffective representation is mentioned throughout.

To the extent Bolt argues fraud of his attorneys as a basis for relief, which in any event is not relevant to the Petitioners, he was entitled to an independent action of legal malpractice as a remedy which he did pursue and settle. Rule 60(b)6 does not allow a court to relitigate matters a party believes were improperly handled by his hired counsel. It has long been held that the mistakes of counsel are chargeable to the client. *See Link v. Wabash Railroad Co.*, 82 S. Ct. 1386, 1390 (1962). Lastly, Constitutional arguments made by Bolt suggesting ineffective assistance of counsel are simply inapplicable in this civil matter where he selected and hired his own counsel.

The trial court issued a memorandum opinion on Bolt's Motion for Relief from Judgment under Rule 60(b)6, stating why it was denied on the merits. (R1-113-1). The trial court stated that "there must be an end to the litigation," and that Bolt's "having consented to the judgment, and the judgment having been entered" and unsuccessfully appealed, "this case is at an end." (R1-113-3). As such, Bolt has not provided any new reasons to justify relief under Rule 60(b)(6) aside from paranoid and speculative explanations which amount to pure conjecture.

III.

PETITIONER IMPROPERLY CALLS FOR THE EXERCISE OF THE SUPERVISORY POWER OF THIS COURT, BUT, IN ANY EVENT, IS BARRED BY THE LAW OF THE CASE DOCTRINE.

Under Rule 10 of the Rules of the Supreme Court, the supervisory power of this Court may be invoked only when a United States court of appeals has sanctioned a departure far from the accepted and usual course of judicial proceedings. Though Petitioner would have this Court believe such a departure is evident in his essay erroneously entitled "judicial activism," such activity has not occurred in the lower court.

As a general rule, a consenting party cannot appeal an order granting a voluntary dismissal of an action. *See McGregor v. Board of Com'rs of Palm Beach County*, 956 F.2d 1017 (11th Cir. 1992); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005 (11th Cir. 1986). The Eleventh Circuit has consistently held that a party who has consented to a judgment may not appeal issues that have been settled by that judgment unless they have expressly reserved the right to do so. *See Dorse v. Armstrong World Industries*, 798 F.2d 1372, 1374-77 (11th Cir. 1986); *White v. C.I.R.*, 776 F.2d 976 (11th Cir. 1985); *Shores v. Sklar*, 885 F.2d 760, 764 (11th Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990); and *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990).

Petitioner, Bolt, has not reserved the right to appeal any issue in this case. Bolt was represented by counsel and aware of the ramifications of agreeing to a voluntary dismissal with prejudice. As such, the Eleventh Circuit dismissed Bolt's claim for relief on February 15, 1995, stating that his agreement to the entry of judgment in this case without reservation of the

right to seek appellate review of any issue barred the appeal. (ER-100-1). That Order is the law of the case.

Under the Law of the Case doctrine, findings of fact and conclusions of law by the appellate court are binding in all subsequent proceedings in the same case in trial courts and courts of appeal. *See, e.g., Heathcoat v. Potts*, 905 F.2d 367 (11th Cir. 1990); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984) (purpose of Law of the Case doctrine is to ensure the litigation will come to an end and to assure the obedience of lower courts to appellate court decisions).

The only circumstance in which the Law of the Case doctrine would not preclude a later appeal from deciding an issue decided on a previous appeal, is if that prior decision was clearly erroneous and would create manifest injustice. *Heathcoat*, 905 F.2d at 872. This is certainly not the case, as has been argued above. By utilizing Rule 60(b) for an unintended purpose, Bolt has attempted to evade the Eleventh Circuit's dismissal of his prior appeal, even though the Law of the Case doctrine bars reconsideration of those issues already appealed.[5]

Petitioner Bolt's rambling argument for a Writ of Certiorari is an improper, baseless and frivolous attempt to have the order dismissing his case vacated following a conscious and voluntary decision he made at trial twelve years into this litigation which has inevitably arrived in the court of last resort.

---

5. In the Eleventh Circuit's Order of February 15, 1995, granting Appellees' Motions to Dismiss Bolt's appeal, Chief Judge Tjoflat and Circuit Judges Dubina and Barkett stated that Bolt's "agreement to the entry of judgment in this case without reservation of the right to seek appellate review of any issue" barred the appeal. For this proposition, the judges cited *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989), *cert. denied*, 394 U.S. 1045 (1990), and this Court's decision of *Swift & Co. v. United States*, 276 U.S. 311, 324 (1978).

CONCLUSION

For the foregoing reasons, the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Petitioners,

v.

DAYTONA COMMUNITY HOSPITAL; ORMOND BEACH MEMORIAL HOSPITAL; RICHARD BOYE, M.D.; RALPH MARINO, M.D.; SHED ROBERSON, M.D.; and ALVIN SMITH, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT ORMOND BEACH MEMORIAL HOSPITAL

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, UNDER AN ABUSE OF DISCRETION STANDARD, PROPERLY AFFIRMED THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA'S DENIAL OF PETITIONERS' MOTIONS FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(4) & (6).

PARTIES TO THE PROCEEDINGS

Petitioners are RICHARD A. BOLT, M.D., and RICHARD A. BOLT, M.D., P.A.

Respondents are MEMORIAL HOSPITAL OF ORMOND BEACH; RICHARD BOYE, M.D.; RALPH MARINO, M.D.; SHEDRICK ROBERTSON, M.D.; ALVIN SMITH, M.D.; and DAYTONA BEACH COMMUNITY HOSPITAL n/k/a ATLANTIC MEDICAL CENTER-DAYTONA.

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Supreme Court of the Untided States, Rule 10 8

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, MEMORIAL HOSPITAL OF ORMOND BEACH ("Ormond"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

REPLY TO STATEMENT OF THE CASE

Ormond submits the following reply to the Statement of the Case to present to the Court the areas of disagreement with the statement of facts submitted by Petitioners, and to supply important information that has been omitted. In an attempt to color the proceedings below, Petitioners have presented the Statement of the Case in a biased and argumentative fashion; as such, Respondent is dissatisfied with Petitioners' presentation of the Statement of the Case and must therefore reject same.

The Complaint in this action was filed on March 23,

1982.[1] The Plaintiffs are Dr. Richard A. Bolt, a general surgeon, and his Professional Association ("Bolt"). Bolt moved to Daytona Beach in the Summer of 1979 and was granted probationary staff privileges at the following three Hospitals: Halifax Hospital Medical Center ("Halifax"), Daytona Community Hospital ("DCH") and Ormond. All three Hospitals are located in Volusia County, Florida.

Two years later, in the Summer of 1981, at the conclusion of his mandatory probationary period, Dr. Bolt filed applications at each of the Hospitals for permanent staff privileges. In October 1981, he converted his application to Ormond to one for "consulting" staff privileges.

The Complaint charged that the Hospitals and five local physicians violated the Federal Antitrust and Civil Rights laws

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[1] The facts set forth in this introduction are taken from the district court and Eleventh Circuit opinions in this case, Bolt v. Halifax Hosp. Medical Center, slip op., Dkt. No. 82-122-ORL-CIV-18 (M.D. Fla. Mar. 21. 1984), aff'd in part, rev'd in part, and remanded, 891 F.2d 810 (11th Cir. 1990), cert. denied, 110 S.Ct. 1960 (1990)

by "conspiring" to deny Bolt's applications for permanent staff privileges, and by failing to afford him due process in the administrative "peer review" proceedings, conducted by the medical staff at each Hospital and required by Florida law.

The case then went to trial in February 1984 before the Honorable Richard B. Kellam, United States District Judge for the Eastern District of Virginia, Norfolk Division, sitting by designation. The District Court required Bolt to prove the "conspiracy" he was alleging, a dispositive issue as to his Federal Antitrust claims of a "conspiracy" in restraint of trade and a "conspiracy" to monopolize, before proceeding to proffer any alleged co-conspirator hearsay. However, Bolt failed to proffer any evidence of a conspiracy and the court directed a verdict for the Defendants on those claims and dismissed all pendent state claims. The Eleventh Circuit issued a panel opinion in 1988, 851 F.2d 1273 (11th Cir. 1988) [Bolt I], which was then vacated, 861 F.2d 1233 (11th Cir. 1988) (en banc)

[Bolt II], and remanded to the panel, 874 F.2d 755(11th Cir. 1989) (en banc) [Bolt III], which issued its final opinion, noted above, in January 1990., 891 F.2d 810 (11th Cir.). cert. den., 110 S.Ct. 1960 (1990) [Bolt IV].

The Eleventh Circuit agreed that the trial evidence was insufficient to justify sending the case to the jury, but reversed on the grounds that one proffered "expert" witness, Dr. E.R. Woodward, should have been allowed to testify. Bolt v. Halifax Hosp. Medical Center, 891 F.2d 810, 827 (11th Cir.), cert. den., 110 S.Ct. 1960 (1990) [Bolt IV].

Bolt's trial was set for February 3, 1992. A week before trial, Halifax filed an emergency motion to stay the proceeding which was granted by the Eleventh Circuit on January 27, 1992. Additionally, the Court opined that state action immunity applied to Halifax. Bolt v. Halifax Hosp. Medical Center, 980 F.2d 1381 (11th Cir. 1993) [Bolt V], rehearing den. 988 F.2d 1220 (1993) [Bolt VI].

The case was set for trial on remand on the District Court's own Motion for Rehearing. The case was continued several times and was finally set for trial before the Honorable Robert Merhige, Jr., for the trial period beginning August 8, 1994 (ER-1). On the 4th day of trial, Bolt entered into a Voluntary Dismissal with Prejudice of all pending claims against all Defendants (ER-96). Approximately two months later Bolt had a change of heart, and he filed a pro se Notice of Appeal with the Eleventh Circuit on October 3rd, 1994 (ER-98). The Eleventh Circuit dismissed Bolt's appeal in an unpublished decision (ER-100). [Bolt VII]. On July 16, 1996, nearly two years after Bolt's Voluntary Dismissal, and fourteen years after the initial Complaint was filed, Bolt filed a motion pursuant to Fed. R. Civ. P. 60(b)(4) and (6) to vacate the Judgment which dismissed his claim (ER-107).

On August 14, 1996, the Honorable Robert M. Merhige, Jr., denied Bolt's Motion for Relief from Judgment premised

upon Rule 60(b)(6) alleging fraud committed by his counsel as untimely (R-112). It was further Adjudged and Ordered that Bolt would be granted a period of fifteen (15) days to set forth facts as distinguished from conclusory statements which he contended deprived him of due process of law and thereby entitled to relief under Rule 60(b)(4). (Id.)

On August 21, 1996, Bolt responded with his Amended Motion #1 in Support of 60(b)(4) Relief Regarding "Due Process of Law" Concerns (R-115). Additionally on August 21, 1996 (despite the fact he did not have authority to do so), Bolt filed a Motion for Reconsideration of Judge Merhige's Order Denying Relief from Judgment under Rule 60(b)(6)(R-114). On October 21, 1996, Judge Merhige filed a Memorandum Opinion giving a basis for his denial of Bolt's reconsideration for Relief from Judgment Under 60(b)(6) (R-123). Additionally, Judge Merhige signed an Order that Bolt's Motion for Re-Consideration Under Rule 60(b)(6) was denied

(R-124). Moreover, Judge Merhige filed a Memorandum Opinion indicating his reasons why Bolt was not entitled to relief under 60(b)(4) (R-123). Finally, Judge Merhige also denied Bolt's Request for Relief Under 60(b)(4) Regarding "Due Process of Law" Concerns (R-124). As a result of Judge Merhige's final Orders regarding Rule 60(b)(4) and (6), Bolt filed a Notice of Appeal on November 18, 1996 (R-125).

On October 27, 1998, the Eleventh Circuit in a three sentence unpublished opinion, affirmed the United States District Court of the Middle District of Florida's denial of Bolts' Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(4) & (6) (see Petitioners' Appendix "B"). From there, Bolt filed a Petition for Rehearing and Suggestion of Rehearing, en banc. On May 12, 1998, the Eleventh Circuit denied Bolt's Petition for Rehearing and Suggestion of Rehearing, en banc. (Id.)

REASONS FOR DENYING THE WRIT

Petitioners' claim that the Eleventh Circuit abused its discretion in determining that the United States District Court for the Middle District of Florida abused its discretion in denying Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b)(4) & (6) does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged. Moreover, denying the Petition for Writ of Certiorari is mandated by this Court's standards of review under Rule 10, Rules of the Supreme Court of the United States. Apparently, Petitioners are attempting to invoke this Court's jurisdiction under Rule 10(a). In so doing, however, Petitioners have failed to demonstrate the Eleventh Circuit abused its discretion in affirming the United States District Court 's denial of Petitioners' motions For relief.

A. The Eleventh Circuit did not abuse its discretion in

affirming the United States' District Court for the Middle District of Florida's Denial of Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b) (4).

The Eleventh Circuit did not abuse its discretion in affirming the denial of Petitioners' Rule 60(b)(4) Motion for Relief from Judgment. Rule 60(b)(4) grants relief from Judgment in certain circumstances where a "Judgment is void." A Judgment is not void merely because it is or may be erroneous. Marshall v. Board of Education, 575 F.2d 417, 422 (d. Cir. 1978); Lubben v. Selective Services System Local Bd., No. 27, 453 F.2d 645, 649 (St. Cir. 1972).

In the case at bar, Bolt initially filed a motion pursuant to Fed. R. Civ. P. 60(b)(4) on July 16, 1996 (ER-107). In considering Bolt's initial Rule 60(b)(4) Motion, the trial court found that Bolt had only offered a "general statement to the effect that the trial judge acted in a manner inconsistent with

the due process of law." (R-112). The trial court further found that Bolt made "no further attempt to elaborate on his conclusion concerning due process, nor [did Bolt] state any facts in support of his contention that fraud had been committed by his trial counsel." Id. However, in an effort to ensure that justice prevailed, the trial court granted Bolt a period of fifteen (15) days to set forth facts, as distinguished from conclusionary statements, to show that Bolt was indeed deprived of due process of law. Id.

Subsequently, Bolt filed an Amended 60(b)(4) Motion (R-114). On October 21, 1996, Judge Merhige filed a Memorandum Opinion indicating that Bolt had failed to provide a sufficient factual basis to support his contention that he was denied due process (R-123). Thus, Judge Merhige signed an Order denying Bolt's Motion for Reconsideration under Rule 60(b)(4) (R-124). In the Court's Memorandum Opinion, Judge Merhige specifically noted:

> An examination of the entire trial transcript reveals that the proceeding was not conducted in a manner that deprived Bolt of notice, hearing, or any other fundamental constitutional right. On the contrary, Bolt was questioned by the trial judge and Bolt's counsel in the Judge's chambers. After some discussion, Bolt voluntarily decided to dismiss his case with prejudice as to all Defendants. In exchange, the Defendants agreed to waive any action for costs against the Plaintiffs (R-124).

In the instant case, Bolt has not provided this Court with any evidence or facts to support his allegations that he was denied fundamental due process by the Eleventh Circuit. In his petition Bolt has not provided this Court with any facts which indicate that he was denied due process.

An examination of the transcript from August 11, 1994, reveals that Bolt made a reasoned decision to voluntarily dismiss his claim with prejudice (R-116, pp.36-53). In the Judge's Chambers, Bolt was questioned by Judge Merhige and his counsel, Hal Litchford, Esq. and Donald Christopher, Esq., about proceeding with the case. After some discussion, Bolt

responded "I guess we are over. Thank you very much. I guess we are all through. We will throw in the towel." (R-116, p.44). Dr. Bolt was further questioned extensively about his understanding of the Voluntary Dismissal he was about to agree to:

THE COURT:	If it is a deal at all, it is a deal they don't come after you for costs whatsoever.
MR. LITCHFORD:	All defendants.
THE COURT:	Any of the parties in this suit. Now, is that your understanding, Doctor?
DR. BOLT:	**Uh hum.**
THE COURT:	Is that what you want? Not what you want, is that what you are going to do?
DR. BOLT:	**Uh hum.**
THE COURT:	Uh hum means yes, I gather.
DR. BOLT:	**Yes, sir.**
THE COURT:	All right.

(R-116, p.45)

Thus, as the foregoing colloquy proves, the proceeding was not conducted in a manner that deprived Bolt of his due

process rights. Simply put, Bolt has failed to show any tenable due process argument, especially in light of the fact that Bolt had the opportunity to be heard prior to agreeing to dismiss all parties. As such, Bolt has offered no evidence whatsoever that the Eleventh Circuit abused its discretion in affirming the denial of his Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(4). As such, this Court should exercise its judicial discretion to deny the writ.

B. The Eleventh Circuit did not abuse its discretion in affirming the United States' District Court for the Middle District of Florida's Denial of Petitioners' Motions For Relief from Judgment under Fed. R. Civ. P. 60(b)(6).

The Eleventh Circuit did not abuse its discretion in affirming the denial of Petitioners' Rule 60(b)(6) Motion for Relief from Judgment. Rule 60(b)(6) "vests power in the Courts adequate to enable them to vacate judgments whenever such

action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390 (1949). As a result, the disposition of a Motion for Reconsideration is within the discretion of the District Court and will not be reversed absent an abuse of discretion. Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984). While seemingly severe in application, this standard furthers the compelling interests in the finality of judgments. Id.

In order for a Motion for Relief under Rule 60(b)(6) to succeed, the movant must show that relief "will accomplish justice" in an "extraordinary circumstance." Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847, 864, 108 S.Ct. 2194, 2205 (1988). Usually, relief will not be granted unless the moving party is able to show both injury and circumstances beyond his control prevented the ability to protect his interests. United States v. Alpine Land & Reservoir Co., 984 F.2d 1047 (9th Cir. 1993); cert. den., 510 U.S. 813, 114 S.Ct. 60 (1993).

Thus, courts have not granted relief where the party has made a deliberate litigation decision which later proved to be to his detriment. Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209 (1950). On August 14, 1996, the District Court entered an Order Denying Bolt's Motion For Relief from Judgment premised upon Rule 60(b)(6) (R-112). In the Memorandum which accompanied the Order, the Court stated the reasons behind its denial of Bolt's Rule 60(b)(6) Motion as follows:

> There must be an end to litigation. Plaintiff Bolt having consented to Judgment, and the Judgment having been entered and he having appealed that Judgment and lost, this case is at an end....[Bolt's] contention of fraud is untimely in any event. That portion of Bolt's motion which seeks to vacate the Judgment pursuant to 60(b)(6) as a result of alleged fraud will be denied.

(R-113)

Rule 60(b)(6) provides a judgment may be relieved For "any other reason justifying relief." In the instant case, Bolt has interpreted that decision literally to mean that if a party is not

happy with a previous settlement agreement, then that is a "reason" to be entitled to relief under Rule 60(b)(6). Simply put, this is not how Appellate Courts have interpreted the finality of settlement agreements. As a general rule, a party that consents to the entry of a judgment waives his right to appeal. Swift & Co. v. U.S., 276 U.S. 311, 324 (1928) (quoting Nashville, Chattanooga & St. Louis R.R. v. U.S., 113 U.S. 261, 5 S.Ct. 460 (1885)). Moreover, a consent to an entry of Judgment without reservation of the right to appeal a particular claim bars a subsequent appeal. Shores v. Sklar, 885 F.2d 760, 764 (11th Cir. 1989), cert. den., 493 U.S. 1045, 110 S.Ct. 843 (1990).

In short, Bolt has offered no evidence whatsoever that the Eleventh Circuit abused its discretion in affirming the denial of his Motion for Relief from Judgment Under Rule 60(b)(6). As such, this Court should exercise its judicial discretion to deny the writ.

CONCLUSION

For these reasons, the Petitioners' Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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